IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No. 448

THE NIAGARA FALLS POWER COMPANY

v.

FEDERAL POWER COMMISSION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

JOSEPH M. PROSKAUER,
RANDALL J. LEBOEUF, JR.,
WARREN TUBBS,
LAUMAN MARTIN,
J. ALVIN VAN BERGH,
Counsel for Petitioner,
The Niagara Falls Power Company,
15 Broad Street,
New York 5, New York.

LEBOEUF & LAMB,
Of Counsel.

INDEX

Table of Cases Cited

IN THE

Supreme Court of the United States

OCTOBER TERM 1943

THE NIAGARA FALLS POWER COMPANY *v.* FEDERAL POWER COMMISSION.	No.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, The Niagara Falls Power Company, prays that a writ of certiorari be issued to review a judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above-entitled cause on October 4, 1943, affirming as modified two orders of the Federal Power Commission which determined for petitioner's hydro-electric project the "actual legitimate original cost" thereof as of March 2, 1921, instead of "fair value" as provided by petitioner's license issued under the Federal Water Power Act of 1920, and directing petitioner to remove from its Fixed Capital Accounts and to charge to its Earned Surplus $15,537,943.56.

Opinions Below

The opinions of the Federal Power Commission are found at R. Vol. V, 2896-2932, 3037-3042. The opinions of the Circuit Court of Appeals (R. Vol. VI, 3115, 3130) have not yet been reported. A petition for rehearing was denied without opinion September 2, 1943 (R. Vol. VI, 3169).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered October 4, 1943. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 313 of the Federal Power Act.

Questions Presented

1. Whether the Federal Power Commission may repudiate a vital term of the license issued to petitioner on March 2, 1921 after voluntary application therefor by petitioner and in respect of which Congress declared the license once issued may only be "altered or surrendered upon mutual agreement between the licensee and the Commission" (Section 6), and that not even amendment of the Act "shall affect any license theretofore issued * * * or the right of any licensee thereunder" (Section 28).

2. Whether the United States after contracting in 1921 for an option to buy petitioner's property on the basis of "fair value", may breach the contract in 1942 and make petitioner consent to sell its property to the United States on an entirely different basis, *i.e.*, alleged cost to petitioner's predecessors.

3. Whether the Federal Power Commission, consisting of the Secretary of War (Newton D. Baker), the Secretary of the Interior (John Barton Payne), and the Secretary of Agriculture (Edwin D. Meredith) acted within its statutory powers in issuing to petitioner on March 2, 1921 a "fair value" license under Section 23 of the Federal Water Power Act of 1920 which read:

> "Sec. 23. That the provisions of this Act shall not be construed as affecting *any permit or valid existing right of way heretofore granted,* or as confirming or otherwise affecting any claim, or as affecting *any authority heretofore given* pursuant to law, but any person, association, corporation, State, or municipality, holding or possessing such permit, right of way, or authority may apply for a license hereunder and upon such application the commission may issue to any such applicant a license in accordance with the provisions of this Act, and in such case the provisions of this Act shall apply to such applicant as a licensee hereunder: Provided, That when application is made for a license under this section for a project or *projects already constructed, the fair value* of said project or projects determined as provided in this section, shall for the purposes of this Act and of said license be deemed to be the amount to be allowed as the net investment of the applicant in such project or projects as of the date of such license, or as of the date of such determination, if license has not been issued. Such fair value may, in the discretion of the commission, be determined by mutual agreement between the commission and the applicant or, in case they can not agree, jurisdiction is hereby conferred upon the district court of the United States in the district within which such project or projects may be located, upon the application of either party, to hear and determine the amount of such fair value."

4. Whether a Commission which for seventeen years administratively recognized the validity of a term of a license issued by it, may negative its whole administrative history with respect to said term by completely reversing its position.

5. Whether any principle of administrative law permits the Commission to repudiate a vital term of a license contract where there has been reliance on its terms by the parties thereto for a period of more than 21 years, where the Commission in the exercise of its jurisdiction in the premises has recognized the validity of the vital term and where the Commission has consistently represented to the petitioner and to the Congress that it was obligated to abide by the term of the license here in question.

6. Whether any principle of administrative law forbids a court from overruling a Commission when that "tribunal reverses itself" and deliberately elects to repudiate a vital term of a contract to which the United States is a party, when there is no showing of fraud, misrepresentation or error in fact, but only an arbitrary election on the part of the Commission to reverse an earlier interpretation of the statute which it was directed by Congress to administer, after petitioner had contracted on the strength of the first interpretation and relied thereon for twenty-one years.

7. Whether the Federal Power Commission may confiscate petitioner's property in contravention of amendment V of the Constitution, direct charges to petitioner's Earned Surplus Account and substantially impair petitioner's capital by an order purporting to determine "actual legitimate original cost" of petitioner's hydro-

electric project as of March 2, 1921 instead of negotiating "fair value" as the license provides, and by directing petitioner to write off amounts from its assets following such determination where such action is in direct violation of the license contract which alone gives the Commission jurisdiction in the premises.

8. Whether if "actual legitimate original cost" and not "fair value", as provided in petitioner's license, is properly the subject of a determination, the Commission could disregard the definition of "cost" prescribed by Congress in Section 3 of the Act and by statute incorporated in the Commission's own rules (18 Code Fed. Reg. §103.02-1 *et seq.*), *i.e.*, actual cost to petitioner and not cost to petitioner's predecessors in interest, and thereby confiscate petitioner's property.

Statutes Involved

The statutes involved are the Federal Water Power Act of 1920 (41 Stat. 1063) and the Federal Power Act (c. 687, Title II, 49 Stat. 838, 16 U. S. C. 791-825). Pertinent provisions of these Acts are set forth in the Appendix, *infra,* pages 32-37.

Statement

On March 2, 1921 petitioner accepted the first license issued by the Federal Power Commission under the Federal Power Act of 1920. That license (R. Vol. IV, 1988-2013, Ex. 2) is a contract between the United States and petitioner (R. Vol. V, 2860, Ex. 135). The Act then and now declares that "upon acceptance by the licensee", a license "may be altered or surrendered only upon

mutual agreement between the licensee and the commission" (Sec. 6), and that not even a Congressional "alteration, amendment, or repeal shall affect any license theretofore issued * * * or the rights of any licensee thereunder" (Sec. 28). The license itself required acceptance by petitioner and could be modified only on consent of petitioner (R. Vol. IV, 2001). Among other things, indicating the true contractual relationship created by the license, the United States may "recapture" petitioner's hydro-electric project at a price fixed by statute (Sec. 14)[1] and by the license itself. For the project property existing on the date of the license, the statute and contract provide that the United States shall pay on the basis of "fair value". Section 23 of the Act provides that the "fair value" of the project as of license date "shall for the purposes of this Act and of said license be deemed to be the amount to be allowed as the net investment of the applicant in such project or projects as of the date of such license," and the license accordingly contained such a provision (R. Vol. IV, 2006).

The decision of the Court below is an affirmance of the Commission's action in repudiating this vital term of the contract 21 years after the issuance of the license. In addition the Court below has approved the Commission's action in directing a $15,000,000 writeoff from petitioner's assets against earned surplus, an amount far in excess of petitioner's surplus. The material facts underlying the

1. All section references in this petition are to sections of the Federal Water Power Act of 1920 under which petitioner applied for and received the license which has given rise to the instant case. The section references in the opinion of the Court below indicate that the Court erroneously used the text of Federal Power Act of 1935 for reference. The 1920 Act is controlling in this case and was specifically incorporated in petitioner's license (R. Vol. IV, 2003, Ex. 2).

The Federal Power Act is relevant here only insofar as it added procedural provisions for review of the Commission's order.

judgment and decree which petitioner seeks herein to have reviewed follow:

Petitioner and its predecessors had for many years operated a hydro-electric project diverting waters of the Niagara River, an international boundary stream, over its own premises, returning the same to the Maid of the Mist Pool below the Falls in the exercise of its riparian rights, ownership of lands under water, and such permits, both State and Federal, as were from time to time made requisite. There is no dam in or across the Niagara River for this project. The United States has no proprietary interest in the project. The project does not interfere with the navigability of the Niagara River (R. Vol. V, 2676, Ex. 54).

On June 10, 1920, the date of the enactment of the Federal Water Power Act, petitioner had a permit (R. Vol. V, 2745) to divert not to exceed in the aggregate a daily diversion at the rate of 19,500 cubic feet per second, issued by the Secretary of War under and in pursuance of a Joint Resolution (41 Stat. 163). Petitioner also had War Department permits issued under authority of the Rivers and Harbors Act of 1899 (30 Stat. 1121) for the maintenance of a system of cribs and booms in the Niagara River which were the only structures of petitioner occupying any part of the River.

Petitioner's license was issued by the Commission for a "project already constructed" under and in pursuance of Section 23 of the Act (R. Vol. VI, 3119). The license itself recited that "petitioner's application involved diversion of water of the Niagara River through the project of applicant already constructed * * * in respect of which project so far as already constructed said applicant had on the 10th day of June, 1920, a permit, right-of-way and authority, * * *" (R. Vol. IV,

1988, Ex. 2). Petitioner voluntarily applied for and accepted the reciprocal rights and obligations contained in the license thus issued to it by the Commission on March 2, 1921. The Federal Water Power Act contained no prohibition against continued operation of petitioner's project without a license from the Commission. Petitioner, therefore, did not apply for the license *in terrorem.*

Indeed, an avowed purpose of the Federal Water Power Act of 1920 was to provide for the private development of water power. From the First Annual Report of the Federal Power Commission to the Congress it appeared that "For many years Federal laws had been wholly unsuited to prevailing conditions. The rights granted were so insecure and the liabilities imposed so uncertain that only in occasional instances could water-power development which required Federal authority be financed;" (p. 1). The same report recited that "In place of the uncertain tenure and unknown requirements of previous legislation an applicant for the power project under the Federal Water Power Act may secure a license for a term not exceeding 50 years. The license is a contract between the Government and the licensee, expressly contains all the conditions which the licensee must fulfill, and, except for breach of conditions, cannot be altered during its term either by the Executive or by Congress without the consent of the licensee" (p. 50, R. Vol. V, 2860, Ex. 135).

Twenty-one years later, on June 9, 1942, following hearings, the Commission rendered an opinion holding that petitioner "could not and did not qualify for a fair value license under Section 23, and the net investment in its project must be determined on the basis of actual legitimate original cost under Section 4 of the Act" (R. Vol. V, 2909).

The Commission's order found the "book cost of all fixed capital of The Niagara Falls Power Company in service on March 2, 1921 was $44,453,868.68". The Commission's accounting witness testified that such sum was the cost to petitioner of its property measured by securities issued and liabilities assumed therefor at the time of its organization in 1918, plus the net cost of additions to the date of issuance of license (R. Vol. III, 1650-1651, 1655).

The Commission's order allowed to petitioner the amount of $24,680,680.22, as the actual legitimate original cost of its project as of license date, excepting certain items reserved for further consideration. The order also directed that petitioner remove from its fixed capital accounts and charge off against earned surplus the amount of $15,537,943.56 which the Commission held was not allowable as assets on petitioner's books. Since petitioner's surplus is substantially less than $15,000,000, compliance with the Commission's order will substantially impair petitioner's capital (R. Vol. V, 3071).

The Court below first affirmed the Commission's repudiation of the fair value clause in petitioner's license on the ground that the Commission in 1921 had exceeded its powers by including that clause in petitioner's license, because petitioner did not have a continuing Federal permit to divert water from the Niagara River (R. Vol. VI, 3122).

Petitioner had, however, at the time the Act became effective, not only all requisite Federal permits, but also all the Federal permits which were available to it under existing statutes, *i.e.*, authority under a Joint Resolution of Congress and permits from the War Department under the Rivers and Harbors Act. The license as noted above recites possession of a permit by petitioner. The Court thus plainly misconstrued Section 23 and petitioner's quali-

fications for a license thereunder. See pages 2-17, 19-24, *infra.*

In holding that the Commission could repudiate a vital term of the license contract, the Court below said that the case at bar "is different from the usual one in two important respects: (1) There was no customary interpretation, but only a single instance; and (2) The tribunal has reversed itself". The Court failed to appreciate the true nature of the license—that it is an executed contract binding upon the parties thereto and obviously cannot be the subject of administrative rulings. The holding of the Court below completely overlooks the evidence, over a period of 17 years after issuance of the license, that the Commission on behalf of the United States recognized its obligations to carry out the fair value provisions of the license which it has now attempted to repudiate and so advised the Congress (R. Vol. V, 2844, Ex. 128, 2845-2850, Ex. 129, 2854, Ex. 132, 2856-2857, Ex. 133, 2867-2868, Exs. 141-144, 2869-2870, Ex. 145, 2871-2872, Ex. 146).

The Court below further held that the Commission could substitute a determination on the basis of actual legitimate original cost under Section 4 of the Act instead of the appraisal of fair value under Section 23. This determination is at odds with the statutory mandate and the license itself as will be elaborated at pages 12-18, *infra.*

The Court below also affirmed the Commission's determination of actual legitimate original cost of petitioner's project, except as to an item not under review here, and held that the Commission could make that determination by going behind the cost of the project to petitioner, the licensee, a new corporation formed October 31, 1918 and utilizing the alleged cost of project property to predecessors in title to petitioner. The Court below thus

affirmed the Act of the Commission in rejecting the price which petitioner itself paid for the project as the criterion for determination of actual legitimate original cost.

Petitioner contended before the Commission and the Court below that if actual legitimate original cost of its project property as of March 2, 1921 was to be determined instead of "fair value" as provided by its license, such cost was the cost to petitioner, a new corporation formed in 1918, measured by the amount of securities issued and liabilities assumed to acquire the project property from petitioner's predecessors. The Court below rejected petitioner's position and held that the actual legitimate original cost referred to in Section 3 of the Federal Water Power Act of 1920, wherein such cost is "as defined and interpreted in the 'classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission'" permitted the Commission to fix the "cost" of petitioner's project on the basis of alleged costs to predecessors. In reaching this conclusion the majority of the Court below considered extensively Section 103.41 of Title 18, Code of Federal Regulations, which is a part of the 1914 I. C. C. Classification but did not apply to petitioner's project the applicable Section 103.02-1—"*The carrier* means the accounting carrier except when otherwise specifically indicated".—Section 103.02-2—"*Costs* shall be actual money costs to the carrier"—and Section 103.02-3—"The charges to the accounts of this classification shall be based upon the cost of the property acquired. When the consideration given for the purchase or improvement of property * * * is other than money, the money value of the consideration at the time of the transaction shall be charged to these accounts * * *".

Specification of Errors to be Urged

1. Did the Court below err in affirming the action of the Commission which effected the repudiation of an express and vital term of the license issued to petitioner on March 2, 1921 under and in pursuance of Section 23 of the Federal Water Power Act of 1920?

2. Did the Court below err in holding that it was forbidden from holding that the instant decision of the Commission was mistaken when the Commission reversed its own action of March 2, 1921 in issuing to and executing petitioner's license?

3. Did the Court below err in holding that, assuming a determination of the actual legitimate original cost of petitioner's project as of March 2, 1921 may be made, such cost may be determined by ignoring the actual cost of the project to petitioner and adopting in lieu thereof alleged costs incurred by predecessors in interest?

Reasons for Granting the Writ

1. Whether the Federal Power Commission as an agent of the United States may by its own order, without consent of the petitioner, repudiate a vital term of its contract with petitioner as a licensee under the Federal Water Power Act of 1920 presents an important question of Federal law which has not been, but should be, settled by this Court.

At June 30, 1942, there were 134 hydro-electric projects under major license.[1a] Such licenses for major projects are for long periods of time, in many cases fifty

1a. Statement of the Federal Power Commission to the 78th Congress pursuant to Section 4(d) of the Federal Power Act for the fiscal year ended June 30, 1942, pages 6-8.

years. Moreover, the Commission has instituted an investigation of all navigable waters of the United States and all other waters of the United States subject to Federal jurisdiction with a view to ascertaining what hydro-electric power developments are now being operated and maintained without a license or other valid permit from a Federal agency. Approximately 1,446 cases will be set for hearing or further investigation concerning unlicensed operation of the project in question.[2] Licenses have recently been required by the Commission in the case of unlicensed constructed projects built both before and after June 10, 1920.[3]

Until the decision below, a licensee could rely on the terms of the license contract which it made with the Commission. Each license is an individual contract looking to the ultimate purchase by the United States of the licensed project. The license terms may vary within the statutory discretion given the Commission.

This Court has considered carefully the far-reaching scope of a license and has recognized the importance of the terms of a license. *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 419-429. To petitioner, individually, the terms on which the United States may acquire its project are of vital importance and should not be the subject of repudiation by the Commission twenty-two years after issuance of the license.

The decision sought to be reviewed thus affects not only petitioner in its individual relationship with the Commission but goes to the very heart of the statutory power of

2. Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 76th Congress, First Session, on the Independent Offices Appropriations Bill for 1940, page 116.

3. *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 123 F. (2d) 155, certiorari denied 315 U. S. 806; *In the Matter of Bellows Falls Hydro Electric Corporation*, 2 F. P. C. Reports 380.

the Commission in its dealings with every licensee with whom on behalf of the United States the Commission has made or may make a contract pursuant to the express terms of which United States may acquire the property of a licensee.

This Federal Water Power Act incorporated in the license (R. Vol. IV, 2003, Ex. 2) and the license itself make the license a valid and binding contract between the United States and the licensee (R. Vol. V, 2860, Ex. 135). Each license must be conditioned upon acceptance by the licensee of all the terms and conditions of the Act (Section 6). A license may be altered only upon mutual agreement between the licensee and the Commission (Section 6). No alteration, amendment or repeal of the Act may affect any license theretofore issued or the rights of any licensee thereunder (Section 28). Petitioner's license required acceptance by petitioner and could be modified only on petitioner's consent (R. Vol. IV, 2011, Ex. 2).

The Commission recognized the contractual nature of the license and so advised Congress in its First Annual Report to Congress (see page 8, *supra*).

Not only petitioner, but Congress was repeatedly told that petitioner was entitled to rely upon that term of the license providing for a "fair value" base for its project then already constructed.

Its Annual Reports to Congress are replete with cumulative evidence that petitioner was deemed entitled to a net investment based on fair value for its then existing plant. Thus in its Fifth Annual Report for the fiscal year ended June 30, 1925, Congress was informed (R. Vol. V, 2867, Ex. 141):

"No. 16. Niagara Falls Power Co., Niagara Falls, N. Y.

"This is a project of very large capacity located at the Falls of the Niagara River. A large part of the project was already constructed when license was issued on March 2, 1921, since which time important additions and extensions have been constructed and placed in service. The fair value of the old plant and the cost of new construction is to be determined."

From its Eleventh Annual Report (1931) under "Accounting Work in Progress" (R. Vol. V, 2868, Ex. 143) there appears:

"16. Niagara Falls Power Co., The Fair value of old properties, cost of new construction, additions, betterments, retirements, etc."

So, too, in its Twelfth Annual Report for the fiscal year ended June 30, 1932, Congress was advised, under "Accounts Audited in Whole or in Part But Investment Not Finally Determined" (R. Vol. V, 2868, Ex. 144):

"16. The Niagara Falls Power Co. Fair value of constructed project"

As late as March 17, 1931, the minutes of the Commission, as reorganized, observed with respect to petitioner (R. Vol. V, 2869-2870, Ex. 145):

"The Federal license was issued in March, 1921, and under its terms a determination of fair value of the property by the commission is required * * *".

"This procedure contemplates an early determination of fair value by mutual agreement as provided in the act, and in the failure of such agreement, will give to the commission opportunity for determination by the court as provided by law".

Thus, the Commission, for more than seventeen years, recognized its obligation in respect of the "fair value of the completed parts of the project as of the date of this license" in its reports to Congress and in its dealings with petitioner (R. Vol. V, 2844, 2845-2850, 2854, 2856-2857, 2867-2868, 2869, 2871-2872).

The Commission, in issuing the license to petitioner, acted within its statutory authority.[4] The "fair value" provisions conform to Section 23 of the Federal Water Power Act. The exercise of discretion by the Commission in issuing the license initially on March 2, 1921 is not now subject to reconsideration or review. *Cf. Gray* v. *Powell*, 314 U. S. 402. No authority in the Act or elsewhere is cited by the Commission or the Court below in support of the holding that the Commission may repudiate a term of the license contract. No fraud or misrepresentation is charged against petitioner. The determination by the Commission that it can now repudiate the "fair value" provisions of petitioner's license is grounded on the same facts which were known to the Commission when it granted the license.

This is not a case where the Court may or should feel obligated to defer to the technical expertness of a regulatory agency in the administration of a statute. The question presented to the Court is whether or not a regulatory agency may with impunity repudiate a vital term of a contract made by it on behalf of the United States with petitioner.

---

4. This is not a case where an agent of the United States has entered into an agreement which the law does not sanction or permit, hence (see pages , *infra*) *Utah Power & Light Co.* v. *U. S.*, 243 U. S. 389, 409; *Utah* v. *U. S.*, 284 U. S. 534, 545-546, and *Wilbur National Bank* v. *U. S.*, 294 U. S. 120, 123-124, do not apply. Nor does the license "thwart the plain purpose of a valid law." *United States* v. *San Francisco*, 310 U. S. 16, 31-32.

Observations in recent cases suggest sharp limitations on the power of administrative tribunals to reverse their own solemn adjudications. "We accept this declaration as an administrative construction binding upon the Commission in its future dealings with the companies" (*American Tel. & Tel. Co.* v. *United States,* 299 U. S. 232, 241). "* * * in view of the nature and purpose of the proceeding, we must regard the determination as binding on both the carrier and the Mediation Board. The latter having obtained the determination could not ignore it" (*Shields* v. *Utah Idaho R. Co.,* 305 U. S. 177, 182). "No prior decision of the Secretary stands in the way of his making the determination now" (*United States* v. *Morgan,* 307 U. S. 183, 192). "Where, as in this case, the Commission has made an order having a dual aspect, it may not in a subsequent proceeding, acting in its quasi-judicial capacity, ignore its own pronouncement promulgated in its quasi-legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed" (*Arizona Grocery* v. *Atchison Ry.,* 284 U. S. 370, 389).

Here the Commission acted as a contracting agent when it determined petitioner entitled to a "fair value" clause and issued the license. Under such circumstances, there is no room for the exercise by the administrative agency of its continuing rule-making power (*cf. Helvering* v. *Reynolds,* 313 U. S. 425, 432; *Helvering* v. *Wilshire Oil Co.,* 308 U. S. 90, 100).

If "the grant of power to revoke did not include by fair intendment a power to invalidate by relation the rates established in the past" (*Gt. Northern Ry.* v. *Sunburst Co.,* 287 U. S. 358, 362), *a fortiori* is there no such power where the power of revocation has been expressly disclaimed by the Congress itself.

2. The decision below is, we submit, a serious blow to the integrity of administrative tribunals which this Court has so consistently sought to safeguard.

In the interests of the integrity of administrative tribunals, this Court should resolve whether the Federal Power Commission may repudiate any provision of its own license.

3. An important question of Federal law is presented by the innovation introduced into that law by holding of the court below that a court is forbidden from overruling a Commission when it "reverses" its own "earlier ruling". In applying that doctrine to the facts at bar, the Court extended the continuing rule-making power of administrative agencies to contractual acts of administrative agencies as to which Congress had disclaimed any power of revision, and as to which *a fortiori* no power of revision had been delegated to the administrative body. Maintenance of the integrity of administrative tribunals, Congress and the Constitution requires correction of this novel doctrine propounded below.

4. An important question of Federal law is presented by the repudiation below of the well settled principle of giving an administrative act "peculiar weight" when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new (*Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 315) in favor of a new doctrine that a construction of the Act in 1921, by sponsors of the Act, "has scarcely any weight at all" when the Commission, twenty-one years later, "reverses the earlier one." However broad the scope of

judicial obeisance to true administrative action, it cannot be pressed so far as to supplant the doctrine of contemporaneous construction of a statute with respect to an act and determination which was intended, as here, to have finality. Reinterpretation of a statute may have force where changed conditions suggest the need of new and prospective regulations in the public interest: it can have no scope where the sole object is to declare ultra vires a contract on the strength of which millions of additional dollars have been invested and on the basis of which both Commission and licensee have acted for more than seventeen years. This Court has consistently looked "with disfavor upon any sudden change, whereby parties who have contracted with the Government on the faith of such construction may be prejudiced" (*United States* v. *Alabama Great Southern Railroad Co.*, 142 U. S. 615, 621). This Court should review the extent to which a court is bound by an administrative tribunal's construction of a statute, where that differs radically from the construction which it followed for over a decade and where there has been reliance on the faith of the earlier construction of the Act and substantial investments made in the project predicated on such construction as exemplified in a solemn written and binding contract—the license.

5. Section 23 of the Federal Water Power Act of 1920 has not previously been construed judicially except by the Court below where the result is a denial of petitioner's contract rights under its license of March 2, 1921 and the substantial impairment of petitioner's capital. The rights of petitioner under its license deserve the protection of the Fifth Amendment to the Constitution. Under the circumstances here—where repudiation is made twenty-one years after the acceptance of the contract, petitioner

should be afforded a full review of the interpretation to be given Section 23 in its application to the undisputed facts of record in this case.

6. The Court below and the Commission incorrectly construed Section 23 of the Federal Water Power Act as it applies to petitioner. The "fair value" clause and the Commission's duty to negotiate "fair value" was disregarded by the Commission on the ground that the sponsors of the Act, the contemporaneous Commission, had exceeded its powers, by including in petitioner's license a "fair value" clause, when petitioner did not have a continuing federal permit.

Petitioner had, however, at the time the Act became effective, not only all requisite federal permits, but also all the federal permits which were then available, *i.e.*, authority under a Joint Resolution of Congress and permits from the War Department.

Petitioner's permit and authority under Joint Resolution of Congress,—which was in effect at the time the Act became law (R. Vol. V, 2745-47 Ex. 60-121),—was brushed aside as insufficient, despite the fact that it was a permit or authority "*heretofore* granted" and "*heretofore* given pursuant to law", to quote the words of Section 23. The reasoning seems to have been that since Congress intended to bring all projects, prospective and already constructed, within the framework of federal licensing, and since Congress had the power to require all such projects to submit to licensing, that Congress must necessarily have intended to treat projects already constructed the same as prospective projects unless the federal permits "heretofore granted" were such as to survive the passage of the Act. This is an obvious non-sequitur. An intent to require all projects to be licensed

under the Act is not inconsistent with an intent that where a federal permit had been "heretofore granted" an existing project, such project already constructed should be entitled to a license with a provision for "fair value" as a base. Nothing in the Act remotely suggests otherwise. Indeed, if it be assumed that Congress intended the new Act to be all embracing, then it would naturally follow that no federal permit whatsoever would survive passage of the Act: all projects, prospective, already constructed, with or without federal permits, would have been required to secure a new license under the Act, and hence, under such reasoning, would have been ineligible for a license with a "fair value" base. Even the Commission has not taken this position.

Petitioner's permits, rights of way and authority under State law were held inadequate by the Commission and the Court below to justify the fair value license. The permits under the Rivers and Harbors Act were ignored.

That the "heretofore" referred to the effective date of the Act, and not to authority surviving the Act's passage, appears conclusively from the fact that in recodification, made after 1935, the "heretofore" was supplanted by the words "prior to June 10, 1920", the effective date of the Act (U.S.C.A., Tit. 16, ¶ 816).

The Commission and the Court below reasoned that only applicants with projects already constructed who had continuing federal permits were embraced within the phrase "holding any permit or valid existing right-of-way heretofore granted * * * or * * * any authority heretofore given pursuant to law", (a) because the inclusion of states among the enumerated applicants necessarily excluded persons not possessed of federal authority and (b) because of casual remarks during the Senate debate.

The Commission and the Court below reasoned that since "a state acts of its own authority and not by grant", the inclusion of a state as a prospective applicant with a project already constructed necessarily implied a *federal* permit, right of way or authority heretofore granted. The conclusion does not follow from the premise, nor is the premise itself sound.

Assuming arguendo that a state might in rare instances operate a hydro-electric project solely of its own authority, it would require in most instances permits or rights of way from the riparian owners. Take petitioner's project, for example, which diverts waters of the Niagara River *over its own premises* returning the same below the Falls in the Maid of the Mist Pool. New York State could not maintain such a project without permit, right of way, or authority from the riparian owners. And the inclusion of the word "state" among those entitled to a fair value license for an existing project was to assure such a license to a state having the requisite authority for maintenance and operation of such a project. No greater significance can be attached to that casual word, as the sponsors of the Act, the original Commission, well knew.

Nor does the course of the Act through Congress bear out the conclusion reached below. The Court and Commission, sought support for their conclusion in isolated sentences of three Senators,—spoken during debate (R. Vol. VI, 3120-3221). Nor do the comments support the conclusion that Congress did not intend petitioner to receive a "fair value" base in its license. At most, they show an intent to make petitioner subject to the terms of the Act. But, even if we assume arguendo that Congress expected petitioner to become a licensee, the question still

remains open as to the terms of the license intended for a project already constructed. The only portion of the Congressional record which bears on this question supports the conduct of the Commission in including a "fair value" clause in the license issued on March 2, 1921. The "fair value" clause was added to Section 23 in conference.

Congressman Esch, Chairman of the Special Committee on Water Power, submitted a statement of the House conferees (59 Cong. Rec. 6385) including the following reference to the amendment to Section 23 dealing with fair value:

> "This amendment provides for the determination of the *valuation of projects already constructed* when application is made for a license to come under the provisions of the act. Without such a provision there would be no means of determining valuation. One of the fundamental elements of the act is the current determination of the 'net investment'. No project should be brought under license until steps have been taken to determine the property value which is to be recognized throughout the entire duration of the license. The amendment provides that *'fair value' is the most satisfactory basis of determination* at the date of the issuance of the license."

Congressman Esch, in charge of the passage of the General Water Power Bill, in commenting (59 Cong. Rec. 6524-5) upon Amendment No. 57 and the Committee's report above referred to added with respect to the fair value proviso finally added to Section 23 just prior to the passage of the bill:

> "Amendment No. 57 relates to the *'fair value'* as the basis for net investment *where an existing*

> *power plant comes under this new law upon its own application.* The House did not have any such provision. We feel that it would be necessary to have some basis of valuation on an existing plant when it comes in under the new law upon its own application, * * *."

Obviously, Congress intended the special provisions of Section 23 of the Act to be an inducement to the owner of an existing hydro-electric project to come under this new law upon its own application and take out a license. This is what petitioner did and received in return therefor a "fair value" license. Despite the legislative intent in respect of license terms to be accorded the owner of an existing project, the Court below has erroneously affirmed the Commission's decision to repudiate the "fair value" terms of petitioner's license. The circumstances here are peculiarly appropriate for review by this Court in the interest of substantial justice to petitioner.

7. The Court below has affirmed an order of the Commission which impairs the capital of petitioner and strikes at its financial integrity as of March 2, 1921, the very date when the Commission issued the license, the term of which is sought to be reviewed here. The confiscatory effect of the Court's decision is particularly harsh when made 21 years after petitioner, in good faith and in reliance upon plain understandable language embodied in a contract, elected to permit the United States to acquire its property in accordance with the terms of a formula which the Commission now repudiates and in lieu thereof would substitute another formula which forthwith robs petitioner of more than $15,000,000 of assets.

8. If petitioner is to be denied "fair value" and its project subjected to ultimate acquisition on the basis of

"cost", then the interpretation of the words "actual legitimate original cost" in Section 3 of the Federal Water Power Act raises questions of broad application which have not been, but should be, passed by this Court. Cost is the basis for net investment in most licenses.

In our view the Court below did not give effect to the definition in Section 3 as Congress directed in providing that the term "cost", used in Section 3 of the Act, is "cost" as defined in the "classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission." The Court in lieu thereof substituted its own definition of the term "original cost" as though those words in a special collective sense were controlling to the application of Section 3.[5] The word "original", as applied to cost, appears only once in the entire Federal Water Power Act where it is used in the phrase "actual legitimate original cost".

Section 4 of the Federal Water Power Act of 1920 thus required a licensee to file with the Commission a statement only of the "actual legitimate cost" of a project after construction thereof.

No controlling significance attaches to the single, isolated use of the word "original" or to the words "actual" and "legitimate" as they precede the word "cost" in the single phrase in the Act (Section 3) in which they are used consecutively. The important word is "cost" which Congress directed to be determined in accordance with the 1914 I. C. C. Classification. Neither

5. The concept of "original cost" considered by this Court in *American Telephone and Telegraph Co.* v. *United States*, 299 U. S. 232, does not appear to have been under consideration by Congress where the Federal Water Power Act was enacted. The term "original cost to date" in Section 19(a) of the Valuation Act (37 Stat. 701) was never suggested for use in the Water Power bills. Congress deliberately chose instead the general instructions of the 1914 I. C. C. Classification issued under authority of the earlier Hepburn Act (34 Stat. 593).

"actual", "legitimate" nor "original" can or should be given any special meaning which would conflict with the term "cost" as defined and interpreted in the 1914 I. C. C. Classification. Congress intended to allow a licensee the same *"cost"* that the Interstate Commerce Commission provided for the accounts of a carrier. The Interstate Commerce Commission has uniformly interpreted its classification to mean that cost to the accounting carrier, *i.e.,* licensee, should be allowed. *Matter of Valuation of Bangor & Aroostook Rd.,* 97 I. C. C. 153, 157; *Matter of Valuation of Georgia Southern & Florida Ry. Co.,* 106 I. C. C. 155, 157; *Matter of Valuation of Mobile & Ohio Rd. Co.,* 143 I. C. C. 459, 462-463; *Matter of Valuation of Pittsburgh, Cincinnati, Chicago & St. Louis Rwy. Co.,* 24 Val. 1, 6, 7-8; *Matter of Valuation of New York Central RR. Co.,* 27 Val. 1, 6. And this is true even where the accounting company is formed by consolidation. *Matter of Valuation of Pittsburgh, Cincinnati, Chicago & St. Louis Rwy. Co.,* 24 Val. 1, 7-8.

Alabama Power Co. v. *McNinch,* 94 F. (2d) 601, 607-608 (C. A. D. C.), suggests that where a licensee is a new corporation the cost to such a licensee of its project property is allowable as project cost under Section 4 of the Federal Water Power Act and that in such instance there should be no recourse to alleged predecessor company costs. No other interpretation of this question save in the Court below has been made. Petitioner is a new corporation under a special act of the New York legislature (R. Vol. IV, 2323, Ex. 34) and under the general corporate law of New York—*People* v. *New York, Chicago & St. Louis RR. Co.,* 129 N. Y. 474, 482—which is controlling on the question. *Wabash, St. Louis & Pacific Rwy. Co.* v. *Ham,* 114 U. S. 587, 595.

The Court below plainly erred in attempting to devise its own standard of "original cost" instead of "cost" as defined by reference to the 1914 I. C. C. Classification. The error of the Court below is emphasized by its erroneous reference to Section 208 of Part II of the Federal Power Act, as including the term "actual legitimate *original* cost", when in fact Section 208 authorizes the Commission only to "investigate and ascertain the actual legitimate cost of the property of every 'public utility' ". Moreover, petitioner is not a "public utility" under Part II of the Federal Water Power Act of 1935, but is a licensee whose status was established under the Federal Water Power Act of 1920 when it accepted the license duly issued to it on March 2, 1921.

Moreover, the concurring opinion in the Court below recognizes that "cost to the present owners [*i.e.*, petitioner] is impliedly recognized as a proper factor" in the Commission's opinion. The concurring opinion also observed "Though 'original cost' is not an altogether clear or happy phrase, I am not persuaded that it only refers to the first investor and does not include a present proprietor of a project * * *" (R. Vol. VI, 3130).

The allowance of the actual cost of its project to petitioner is vital to petitioner to the extent that such an allowance will prevent the loss of more than $15,000,000 of petitioner's assets, will save a charge of that amount against petitioner's earned surplus, which charge would confiscate its property and will save petitioner's capital from substantial impairment.

The decision below on the interpretation of "actual legitimate original cost", unless reversed, will constitute a precedent of general importance which appears palpably contrary to the very direction Congress gave the Commission in Section 3 of the Act and the legislative history of that Section.

8. An important question of Federal law is presented by the conflict which the holding below creates between decisions of the Interstate Commerce Commission and of the Federal Power Commission in their application of the identical accounting rules of the former. The Federal Water Power Act defines cost "as defined and interpreted in the classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission" (Sec. 3). The I. C. C. admittedly construes its said Classification to mean that "cost" is cost to the accounting carrier. The Federal Power Commission has been directed by Congress to accept the I. C. C. Classification "as interpreted" by the Interstate Commerce Commission. Yet, contrary to this provision the Court below has construed the I. C. C. Classification to mean cost to the predecessors of the accounting licensee.

Secretary Merrill's[5a] explanation to the special Committee on Water Power of the House of Representatives, 65th Congress, 2d Session, before whom the Federal Water Power Act with its "cost" provisions was evolved, indicates the clearest intention to abide by the I. C. C. definition of "cost":

> "Mr. Merrill: * * * The next important feature, and I think the most important feature of the legislation, is the provision concerning the price at which the properties may be taken over if the Government, at the end of the 50 years, exercises its right of recapture.
>
> "You will find that provision in section 3 among the definitions which precede the text of the bill.

5a. Oscar C. Merrill, first Executive Secretary of the Commission, a statutory officer (Section 2) more than any other person was probably the father of the "cost" provisions of Sections 3 and 4 of the Federal Water Power Act of 1920. An outstanding advocate of the "cost" principle, he nevertheless specifically recommended to the Commission the "fair value" term in petitioner's license (R. Vol. IV, 2301, Ex. 16).

"The term which we have used is 'net investment,'" * * * (p. 38)

* * * * * * * *

"Mr. Esch: You are using the terminology and also the regulations used by the Division of Valuation of the Interstate Commerce Commission?

"Mr. Merrill: Yes; * * *. It was to avoid the use of a long definition, the terms of which might arouse controversy, that it seemed advisable for the United States to adopt through this legislation, and for the purpose named here, that definition of the word 'cost' which the only recognized Federal agency, the Interstate Commerce Commission, has prescribed in its valuation for railroads. The definition here refers only to that part of the classification which I have here, about five pages, that describes and defines what is meant by 'cost'. This definition would not include the classification of the commission as a classification of accounts. It has nothing whatever to do with that.

* * * * * * * *

"The Chairman: Mr. Merrill, would it not be a good idea for you to incorporate at this state of your hearing so much of that definition as may be applicable?

"Mr. Merrill: I will be glad to do so." (p. 39)

[Here follows on pages 40-44 a complete copy of the General Instructions taken from the I. C. C. 1914 Classification.]

So determined was the Congress to tie "cost" to a specific, existing book, chapter and verse, that it rejected an amendment to the bill before passage by the House designed to modify, only slightly, the reference to the "classification of investment in road and equipment of

steam roads, issue of 1914, Interstate Commerce Commission.''[6]

The Court below, however, has erroneously accepted the Commission's determination of ''cost'' where the Commission has determined cost by recourse to predecessors in interest of petitioner. The Court below, contrary to a specific interpretation by the Interstate Commerce Commission, has denied to petitioner, a new corporation formed by consolidation, the cost of its property measured by securities issued and liabilities assumed upon formation in 1918. The Court below has erroneously held that the consolidation to form petitioner was not a ''purchase'' which entitles petitioner to the cost recorded upon formation in 1918. The concurring opinion as noted differs from the majority, to the extent that it recognizes cost as used in the Act to mean cost to petitioner and not to its predecessors (R. Vol. VI, 3130). The concurring opinion, however, errs in holding that there was no proof that the securities represented cost to petitioner. There was uncontroverted evidence of probative value that the money value of the consideration at the time of the consideration, *i.e.*, acquisition by petitioner in 1918, was equal to the cost shown on petitioner's books (R. Vol. III, 1498-1531, 1590-1615, R. Vol. V, 2788-2793, Exs. 74-79, R. Vol. III, 1577-1589, 1532-1563, 1797-1833). The holding by the Court below that it may disregard the statutory mandate for determination of ''cost'' of a project licensed under the Federal Water Power Act or under the Federal Power Act raises a substantial question of general application which should be resolved by this Court.

6. See 58 Cong. Rec. 2034-5. See also H.R. 715, 65th Cong. 2d Sess. with reference to the first inclusion of the "cost" principle in the General Water Power Bill.

Conclusion

It is respectfully submitted that this petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

JOSEPH M. PROSKAUER,
RANDALL J. LEBOEUF, JR.,
WARREN TUBBS,
LAUMAN MARTIN,
J. ALVIN VAN BERGH,
Counsel for Petitioner,
The Niagara Falls Power Company,
15 Broad Street,
New York, New York.

LEBOEUF & LAMB,
Of Counsel.